

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

# IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESAL PRICE LITIGATION

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO ALL  
ACTIONS

Judge Patti B. Saris

**TRACK TWO DEFENDANTS' RESPONSE TO CLASS PLAINTIFFS'  
STATUS REPORT REGARDING TRACK TWO SETTLEMENT**

The Track Two defendants submit this response to the recent status report filed by Class Counsel regarding the status of the Track Two settlement. Given the repeated delays in the Track Two Final Settlement Approval Hearing, Track Two defendants request that the CMS vendor either meet the latest proffered deadline for the delivery of Track Two data, or that it be required to appear before the Court and explain the reasons for its delay and provide a date certain for its delivery.

## BACKGROUND

Class Counsel's efforts to obtain Track Two data from CMS have a long history. Well before class plaintiffs and the Track Two defendants settled this case, the Court made clear it did not wish to have delays in obtaining Track Two data from CMS impede the speedy progress of this case. *See* July 6, 2006 Hearing Transcript at 56:10-57:3 and 58:15-59:1, attached as Exhibit 1. Class plaintiffs and the Track Two defendants reached a settlement that was finalized in early 2008. A motion for preliminary approval of the parties' settlement was filed in the first week of March 2008. In their memorandum in support of preliminary approval of the settlement, Class

Counsel indicated that it would “seek CMS data, including last known address, payment information and dates of drug administration for all Medicare Part B beneficiaries....” Class Plaintiffs’ Memorandum of Law in Support of Joint Motion for Preliminary Approval of the Track Two Settlement Approval of the Form and Method of Notice to the Class and Scheduling of a Fairness Hearing at 4, attached as Exhibit 2. The settlement was preliminarily approved on April 9, 2008. *See* Order Granting Preliminary Approval of the Track Two Class Settlements, Directing Notice to the Classes, and Scheduling Fairness Hearing, attached as Exhibit 3.

The final approval hearing for the Track Two settlement was initially scheduled for December 16, 2008. *See id.* at 15. That hearing was postponed, in part, because:

“Plaintiffs are still in the process of working with CMS to obtain the correct data related to Class 1 members. The delay in receiving the data occurred because this request for data contained more information, and more data fields, than were previously requested.”

*See* Class Plaintiffs’ Report to the Court Regarding Notice in the Track Two Settlement and Motion to Reset Certain Dates Related to Consumer Claims at 3, attached as Exhibit 4. The final approval hearing was rescheduled for April 27, 2009. Order Revising Certain Dates Related to the Track Two Settlement at 2, attached as Exhibit 5. In a March 2, 2009, Motion for Entry of an Order Granting Final Approval of the Track Two Settlement, Class Counsel represented that:

“[A]lthough full data has not yet been obtained from CMS, Class Counsel anticipate that the Claims Administrator will have sufficient information to mail the simple, one-page explanation of the settlement to each individual identified in the CMS data in the coming weeks – prior to the Fairness Hearing now scheduled for April 27, 2009...[and that] full notice...[will be mailed] to each individual who replies.”

Class Plaintiffs’ Memorandum of Law in Support of Motion for Final Approval of the Track Two Settlement at 5-6, attached as Exhibit 6. This did not occur, but at the April 27 hearing, Class Counsel stated that it had been advised by CMS that CMS would provide the data that

week, and the only question would be the data's adequacy. April 27, 2009 Hearing Transcript at 8:7-9, attached as Exhibit 7. Counsel further stated that it had previously received inadequate data. *Id.* at 8:9-10.

A month later, in May 2009, Class Counsel indicated that it still had not yet received the correct data from CMS, but were attempting to obtain it "so that we can request another final, final approval hearing in late July or early August." *See* May 28, 2009 Hearing Transcript at 23:17-25:4, attached as Exhibit 8. Counsel also stated that he thought notice could be sent out by the end of June 2009. *Id.* at 24:1-2. The final approval hearing for the track Two settlement was again rescheduled, this time for August 11, 2009. *Id.* at 25:4.

In July 2009, the August 11, 2009 final approval hearing was postponed at the request of counsel and was rescheduled for October 21, 2009. *See* Notice of Rescheduling, July 27, 2009 Docket Entry. Prior to the scheduled October 21 hearing, again citing to delays in obtaining Track Two data from CMS's vendor, Class Counsel requested that the Track Two final approval hearing be postponed. *See* Class Plaintiffs' Motion for Approval of Form of Notice to Cash Paying Consumers in Class 3, Approval of Consumer Claims Schedule, and to Reschedule Date for Final Approval of the Track Two Settlement at 4, attached as Exhibit 9. In the same paper, Class Counsel indicated that the data was being processed and was expected to be received from CMS's vendor by October 31, 2009. *See id.* at 2. The final approval hearing was reset for February 3, 2010. Order Regarding Class Plaintiffs' Motion for Approval of Form and Manner of Notice to Cash Paying Consumers in Class 3, Approval of Consumer Claims Schedule, and to Reschedule Date for Final Approval of the Track Two Settlement at 2, attached as Exhibit 10. The data, however, did not arrive from the vendor by October 31.

In a December 4, 2009 filing, Class Counsel again requested that the final approval hearing for the Track Two settlement be postponed due to the delays by CMS's vendor in providing the Track Two data. *See* Class Plaintiffs' Motion regarding Dates Related to Final Approval of the Track Two Settlement at 1, 3 and 4, attached as Exhibit 11. Class Counsel further indicated that CMS's vendor anticipated providing the data by December 31, 2009. *Id.* at 4. The Court agreed to postpone the February 3, 2009 final approval hearing and ordered Class Counsel "to provide the Court with a status report on or before January 15, 2010 regarding the status of notice to Class 1 and receipt of CMS data necessary to effectuate notice to Class 1 consumers." *See* Order Regarding Class Plaintiffs' Motion Regarding Dates Related to Final Approval of the Track Two Settlement at 1, attached as Exhibit 12.

Class Counsel submitted the status report on January 28, 2010 and, in that report, indicated that CMS's vendor continued to experience delays in providing data necessary for Class 1 notice. *See* Class Plaintiffs' Notice of Status Related to Final Approval of the Track Two Settlement at 2, attached as Exhibit 13. In addition, Class Counsel reported that the vendor anticipated a "mid-March" delivery date for the data and that "[i]f further significant delays are encountered, Class Counsel may request that the CMS Vendor provide the Court with the reasons for such delay and provide a Court endorsed date certain for the production." *Id.* at 2.

### **RELIEF REQUESTED**

Given CMS's vendor's repeated failures to meet stated delivery dates, if the vendor does not meet the latest anticipated data delivery date of mid-March, then requiring the vendor to explain the delays and provide a date certain for the data delivery should not be discretionary, but rather should be mandatory. There simply have been too many delays in finalizing the Track Two settlement. Should yet another anticipated delivery date be missed, CMS's vendor ought to

be required to appear before the Court, explain why it has been unable to provide the Track Two data to Class Counsel and provide a date certain when the necessary information will be provided.

Dated: February 4, 2010

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ON BEHALF OF THE TRACK TWO  
DEFENDANTS

**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2010, a true and correct copy of the foregoing TRACK TWO DEFENDANTS' RESPONSE TO CLASS PLAINTIFFS' STATUS REPORT REGARDING TRACK TWO SETTLEMENT was served upon all counsel of record via electronic service pursuant to CMO No. 2 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ Steven F. Barley